Message

From: Mugdan, Walter [Mugdan.Walter@epa.gov]
Sent: 1/20/2021 3:07:05 PM
To: Schaaf, Eric [Schaaf.Eric@epa.gov]
Subject: RE: ACE decision

Thanks – this is pretty comprehensive. (For what I needed, the least detailed of this series of articles was actually sufficient, but this is interesting.)

From: Schaaf, Eric <Schaaf.Eric@epa.gov>
Sent: Tuesday, January 19, 2021 5:56 PM
To: Mugdan, Walter <Mugdan.Walter@epa.gov>
Subject: ACE decision

Probably more detail than you need, but this is a pretty good article – you can toss the earlier ones.

D.C. Circuit Faults EPA For 'Misconstruction' Of 111(d) Power In ACE Rule

January 19, 2021

The divided appellate court panel that vacated the Trump EPA's Affordable Clean Energy (ACE) rule says the exiting administration relied on a "fundamental misconstruction" of its Clean Air Act authority when it scrapped the Obama-era Clean Power Plan (CPP) climate rule and replaced it with the narrower ACE policy.

However, a dissenting judge is floating arguments that could invite conservative justices on the Supreme Court to review the ruling as a way to limit courts' deference to agencies or curb the ability of Congress to "delegate" power to agencies.

In the immediate sense, the Jan. 19 ruling from the U.S. Court of Appeals for the D.C. Circuit in *American Lung Association, et al. v. EPA, et al.* is a loss for the outgoing administration's position that the plain language of section 111(d) of the air act requires any greenhouse gas standards to be based on "inside-the-fence" actions, and thus forecloses the CPP's broader approach that relied on shifting to lower-carbon generation.

As such, the ruling, issued on the penultimate day of President Donald Trump's term, might aid the incoming Biden EPA's attempts to issue tougher GHG standards for the power sector, a key component of his sweeping agenda to address climate change.

But the separate opinion from Judge Justin Walker, a Trump appointee, opens the door to review by the Supreme Court where conservatives hold a 6-3 majority, creating a potential legal risk for the incoming Biden administration.

Specifically, the appellate court panel vacated ACE, directing EPA to "consider the question afresh in light of the ambiguity we see."

The opinion similarly faults the Trump EPA's separate action to repeal the CPP, though the ruling does not precisely opine on the status of that rule.

The D.C. Circuit opinion is the first court ruling to grapple with the thorny administrative law issues surrounding the limits of section 111(d) for climate rules. The Supreme Court issued an unprecedented stay of the CPP in 2016 -- leading most observers to believe that the court was inclined to agree with opponents of the rule -- though its brief stay order did not elaborate on the justices' thinking.

Also, the D.C. Circuit never ruled on the merits of litigation over the CPP, pausing the case after Trump took office to give his administration time to re-assess the rule.

However, despite the fact that President-elect Joe Biden is taking office this week, the appellate court did not hold off on a ruling in this round.

The 2018 ACE rule said EPA now believes the air act "clearly precluded the unsupportable reading of [section 111(d)] asserted" in the CPP, and that the provision bars beyond-the-fence standards.

"It is the EPA's current position that is wrong," says the D.C. Circuit opinion, joined by Judges Patricia Millett and Nina Pillard, two Obama appointees. "For the EPA to prevail, its reading must be required by the statutory text. It fails for at least three reasons, any of which is alone fatal."

Source-Specific Caveat

The panel majority cites the plain language of section 111(d)'s requirement for EPA to base targets on the "best system of emission reduction." That provision "announces its own limitations. Those limitations simply do not include the source-specific caveat that the EPA now interposes and casts as unambiguous."

The opinion adds that there is "no basis" for EPA to claim that source-specific language in another portion of the provision -- addressing how states develop plans to comply with the rule -- "must be read upstream . . . to equate the EPA's 'application of the best system' with the controls states eventually will apply 'at and to' an individual source."

Last, the majority says that even if the two sub-sections were interpreted together, it would not confine EPA to at-the-source controls. "The EPA's entire theory hinges on the Agency's unexplained replacement of the preposition 'for' in 'standards of performance for any existing source' with the prepositions 'at' and 'to.' Yet the statutory text calls for standards of performance 'for' existing sources."

The opinion adds that emission-reduction steps "for" sources could go beyond those that "apply physically 'at' and 'to' the individual source. Emissions trading, for example, might be a way 'for' a source to meet a standard of performance."

Also, the D.C. Circuit majority dismisses as irrelevant any "counterarguments" by EPA that could show its interpretation was reasonable. "Again, the EPA has not claimed to be exercising any such discretion here. It insists instead that the unambiguous terms of the statute tie its hands."

'EPA's Wheelhouse'

Elsewhere in the majority opinion, Millett and Pillard charge EPA's authority to regulate GHGs from power plants does not implicate the high court's "major questions" doctrine that requires clear statutory language for rules of "extraordinary" significance.

"Unlike cases that have triggered the major questions doctrine, each critical element of the Agency's regulatory authority on this very subject has long been recognized by Congress and judicial precedent," they write. "Most importantly, there is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls squarely within the EPA's wheelhouse."

Further, the majority rejects claims by coal sector interests that EPA lacks underlying authority to limit power sector GHGs. A key issue here is whether section 111(d) GHG rules are barred because the agency separately regulates power plants' air toxics under section 112.

This issue featured prominently in litigation over the CPP, but the Trump EPA did not embrace this claim in ACE and many critics of the CPP -- who ended up backing ACE -- similarly dropped the issue, leaving it to be advanced by only some coal firms and free-market groups.

The issue concerns House and Senate amendments to section 111(d) that were never resolved before the 1990 Clean Air Act amendments were signed into law. The Senate amendment clearly allows regulations under both sections, while the House amendment could be interpreted to preclude it.

The D.C. Circuit opinion finds: "EPA has correctly and consistently read the statute to allow the regulation both of a source's emission of hazardous substances under Section [112] and of other pollutants emitted by the same source under Section [111(d)]. The Coal Petitioners' argument rests not on the enacted statutory language, but instead on their own favored reading of one statutory amendment inserted by codifiers."

Last, the opinion scraps EPA's changes to long-standing implementing regulations for section 111(d), which extended timelines for states to submit compliance strategies and for the agency to review those plans. It notes that environmental groups oppose the change because EPA "failed to address the urgency of controlling harmful emissions," particularly GHGs that cause climate change.

"EPA failed to justify substantially extending established compliance timeframes, including deadlines that it has had in place since 1975," the court's opinion says.

Walker Opinion

Meanwhile, Walker's separate opinion -- which concurs with the majority opinion on some limited issues but dissents on several key aspects -- relies heavily on the "major questions" doctrine to support his view that the CPP was unlawful.

"Hardly any party in this case makes a serious and sustained argument that [section] 111 includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting," Walker writes. "And because the rule implicates 'decisions of vast economic and political significance,' Congress's failure to clearly authorize the rule means the EPA lacked the authority to promulgate it."

Walker argues the Supreme Court's 2016 stay "implied that the challengers would likely succeed on the case's merits," adding that the CPP was "arguably one of the most consequential rules ever proposed by an administrative agency."

He acknowledges that the high court "has proceeded with baby steps toward a standard for its major-rules doctrine." While that court's guidance "has been neither sweeping nor precise, the Supreme Court has at least drawn this line in the sand: Either a statute clearly endorses a major rule, or there can be no major rule."

Additionally, Walker, embraces the coal companies' interpretation of the 111/112 issue as a "more mundane reason" to scrap any EPA power section GHG rule issued under section 111.

"The law precludes what the House Amendment precludes. And the House Amendment precludes [section] 111 regulations of coal-fired power plants already covered by [section] 112," Walker writes. -- *Lee Logan* (llogan@iwpnews.com)